

MM Doc. 91-309

## DOCKET FILE COPY ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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MAY 5 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In Re Applications of

KIMLER BROADCASTING, INC.)	BPH-900122MN
ARTISTIC AIRWAVES	BPH-900122MP
BROADCASTERS	
LAURA WILKINSON HERRON	BPH-900122MY

For construction permit  
for a new FM Station on  
Channel 233A at Temecula,  
California

To: The Chief, Mass Media Bureau

**JOINT PETITION FOR APPROVAL OF AGREEMENT AND DISMISSAL OF  
APPLICANTS**

The Kimler Broadcasting, Inc. ("Kimler"), Artistic  
Airwaves Broadcasting ("Artistic") and Laura Wilkinson Herron  
("Herron") hereby jointly petition the Commission pursuant to  
Section 73.3525 of its Rules for approval of the Settlement and  
Merger Agreement (the "Agreement") attached as Exhibit A  
hereto.

Kimler, Artistic and Herron are each applicants for a new  
FM station to operate on Channel 233A at Temecula, California.  
The Agreement provides for (i) the merger of the interests of  
Kimler, Artistic and Herron in their respective applications  
into a new limited liability company, Temecula FM LLC, which  
will be equally owned by each of them, (ii) the filing of an  
amendment to Artistic's application to substitute Temecula FM

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LLC for Artistic as the applicant entity to effectuate this merger of interests<sup>1</sup> and (iii) the dismissal of the applications of Kimler and Herron contingent upon approval of the Agreement and grant of the Temecula FM LLC application.

The Agreement includes a certification, at Section 1, to the effect that none of the parties filed its application for the purpose of entering into or carrying out a settlement agreement and that none of the parties has paid or promised any other party any consideration for entering into the merger, or for the dismissal of its application, except for the mutual promises contained in the Agreement.

There are currently pending petitions to enlarge issues which Artistic and Herron have filed against each other's application. Artistic and Herron hereby request that these petitions be dismissed.

Approval of the Agreement would serve the public interest as it will obviate the need for further proceedings with respect to the parties' mutually exclusive applications for Channel 233A at Temecula, California, thereby conserving the resources of the Commission and the parties, and it will hasten the day when a new television service will be established in Temecula.

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<sup>1</sup>The amendment substituting Temecula FM LLC for Artistic as the applicant entity is being filed simultaneously herewith.

WHEREFORE, for the foregoing reasons, it is respectfully requested that the Agreement be approved, that the amended application of Artistic substituting Temecula FM LLC as the applicant be granted, and that the applications of Kimler and Herron be dismissed with prejudice upon grant of a construction permit for Channel 233A at Temecula, California, to Temecula FM LLC.

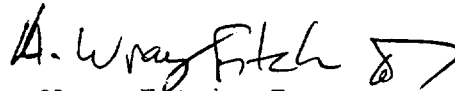
Respectfully submitted,



David Tillotson, Esq.  
4606 Charleston Ter. N.W.  
Washington, DC 20007  
Attorney for Kimler  
Broadcasting, Inc.  
Airwaves



Arthur Belendiuk  
Smithwick & Belendiuk, PC  
1990 M Street, N.W., Suite 510  
Washington, DC 20036  
Attorney for Laura Wilkinson  
Herron



A. Wray Fitch, Esq.  
Gammon & Grange  
8280 Greensboro Drive, 7th Floor  
McLean, VA 22102-3807  
Attorney for Artistic

Broadcasting

## **SETTLEMENT AND MERGER AGREEMENT**

This Agreement is made and entered into as of the 4th day of May, 1999, by and among Kimler Broadcasting, Inc. ("Kimler"), Artistic Airwaves Broadcasters ("Artistic") and Laura Wilkinson Herron ("Herron"):

### **W I T N E S S E T H:**

**WHEREAS,** The parties to this agreement have pending before the Federal Communications Commission ("FCC") applications for a construction permit for a new FM radio station to operate on Channel 233A at Temecula, California, which applications are mutually exclusive with one another and have been the subject of extensive proceedings in MM Docket 91-309 (the "Proceedings");

**WHEREAS,** The parties each have agreed to a settlement of the Proceedings, subject to FCC consent, in accordance with the terms of this agreement;

**WHEREAS,** A settlement of the Proceedings will serve the public interest as it will hasten the day when a new FM radio service will be established at Temecula, California;

**NOW, THEREFORE,** in consideration of the foregoing and the mutual promises herein contained, the parties hereto, intending to be legally bound, agree as follows:

1. On the date that an FCC action approving this agreement becomes a "final order" as hereafter defined (the "Merger Date"), the parties shall merge their interests in their respective applications into a newly created limited liability company ("New Co.") which has been formed by Kimler at Kimler's to provide a vehicle for implementing the settlement and merger provided for herein. The reasonable costs incurred by Kimler in forming New Co., including attorney's fees, shall be reimbursed to Kimler upon a sale or liquidation of the company before any distributions are made to the company's members; provided that such reimbursement shall not exceed \$2,000.00. The articles of organization of New Co. shall specify that New Co. has three members, each with identical membership rights, and shall specify that a unanimous vote of the three members is required before New Co. can take any of the following actions: (1) assume or incur any debts or obligations, absolute or contingent, of any sort, (2) purchase, lease or incur any liability, absolute or contingent for equipment, software, land, tower space and office or building space, (3) hire or retain any employees, consultants or independent contractors, and (4) other than pursuant to the terms of the Purchase Option agree to sell New Co. or sell, lease or disperse any of its assets, including but not limited to the construction permit or license to operate a radio station in Temecula, California.

2. Within five (5) business days of the execution of this Agreement, the parties hereto shall take the following actions:

(a) Artistic shall file a petition for leave to amend its application to specify New Co. as the applicant.

2. Within five (5) business days of the execution of this Agreement, the parties hereto shall take the following actions:

(a) Artistic shall file a petition for leave to amend its application to specify Temecula FM as the applicant.

(b) The parties hereto shall file a joint petition pursuant to Section 73.3525 of the FCC's Rules, together with such other documents as may be required by that section, requesting that the FCC approve this Agreement, dismiss the applications of Kimler and Herron, and to grant Artistic's application as amended to specify Temecula FM in place of Artistic as the applicant.

3. On the Merger Date, Temecula FM shall have no debts or obligations, absolute or contingent, of any sort except for an option to purchase the assets of the Temecula station pursuant to the terms of the Purchase Option Agreement ("Purchase Option") attached as Exhibit B hereto that Temecula FM is entering into with Magic simultaneously herewith.

4. The obligations of the parties under this Agreement are expressly conditioned upon the FCC taking final action approving this Agreement, dismissing the applications of Kimler and Herron and granting Artistic's application as amended to substitute Temecula FM as the applicant within six (6) months of the date hereof. In the event that the FCC does not take such action within the specified time period, any party hereto may, at its option, cause this Agreement to be terminated by giving written notice to the other party provided that the party electing to terminate is not in material default in the performance of any of its obligations hereunder.

5. As used in this Agreement, the term "final action" means any action by the FCC that, by lapse of time or otherwise, is no longer subject to administrative or judicial reconsideration, review, appeal or stay.

6. The parties hereto represent to one another that they each have the power and authority to enter into and carry out this Agreement and that this Agreement constitutes a valid and binding obligation enforceable against each of them in accordance with its terms. The parties further represent to one another that they will perform their obligations and exercise their rights hereunder in good faith and that they will neither take any action, or encourage others to take any action, which could reasonably be expected to delay or interfere with obtaining FCC approval of this Agreement or the exercise of any right of the other party hereunder.

7. The parties shall use their individual and joint best efforts to take no action adverse to this Agreement, the Joint Petition, the dismissal of the other applications and the grant of Temecula FM's application. The parties agree to engage in good faith efforts to address all objections of the Commission to the terms of this Agreement. The parties agree to provide the Commission in a timely manner with such information as it reasonably requests. The parties further agree to use all reasonable efforts in the preparation and filing of all documents that may be necessary or appropriate to reach the results contemplated by this Agreement. Except as otherwise provided herein, each party shall be responsible for paying its own costs incurred with respect hereto.

8. Each party hereto represents and warrants to the other that it has full right and authority to enter into this Agreement and to perform its obligations hereunder, and that all the actions required to be taken as a condition precedent to the valid execution of this Agreement

have been taken and that this Agreement constitutes a legal, valid and binding obligation of such party enforceable in accordance with its terms.

9. This Agreement, along with the other agreements referenced herein; constitute the entire understanding among the parties and no other consideration, action or forbearance is contemplated or relied on by them.

10. The parties to this Agreement state, under penalty of perjury, that they have not promised or received any money or other consideration except as set forth in this Agreement. This Agreement is considered by the parties to be in the public interest because (a) it will eliminate the need for further FCC proceedings, and (b) it would result in the more rapid initiation of a new FM service to the residents of Temecula, California. The parties further state under penalty of perjury that they did not file nor prosecute their respective applications for the purpose of reaching or carrying out a settlement agreement.

11. In the event that any party breaches this Agreement, the breaching party shall have ten (10) days from receipt of written notice of the breach from the notifying party to cure said breach, after which time it shall be deemed to be in default. The parties agree that the failure of any party to perform its obligations under this Agreement is one for which there is no adequate remedy at law, and that in addition to other remedies at law or in equity any party injured by such breach shall have the right to obtain a decree of specific performance entitling it to a temporary restraining order, preliminary injunction, or permanent injunction to specifically enforce and require specific performance of the terms and provisions of this Agreement. The party against which injunctive relief is sought hereby waives the defense in any such proceeding that the other party has an adequate remedy at law and agrees to interpose no opposition, legal or otherwise, as to the propriety of specific performance as a remedy.

12. Any notice, demand, or request required or permitted to be given under the provisions of the Agreement shall be in writing and shall be deemed to have been duly delivered on the date of personal delivery or on the date of receipt if mailed by registered or certified mail, postage prepaid and return receipt requested, and shall be deemed to have been received on the date of personal delivery or on the date set forth on the return receipt, to the following addresses, or to such other address as a party may request:

If To Kimler: Helen Jones  
29771 Bonanza Place  
Canyon Lake, CA 92587  
Fax: 909-244-<sup>5759</sup>~~4348~~ 42.

with a copy that shall not constitute notice to:

David Tillotson, Esq.  
4606 Charleston Terrace, N.W.  
Washington, DC 20007-1911  
Fax: 202-965-2018

If to Artistic: Artistic Airwaves Broadcasters

1839 Avenida Flores  
Encinitas, CA 92024  
Fax: 760-753-6636  
Attn: Audrey Cilurzo, General Partner

with a copy that shall not constitute notice to:

A. Wray Fitch, III  
Gammon & Grange  
8280 Greensboro Drive  
7th Floor  
McLean, VA 22102-3807

If to Herron: Ms. Laura Wilkinson Herron  
1938 Fields Pond Drive  
Marietta, GA 30068  
Fax: 770-650-2839

with a copy that shall not constitute notice to:

Arthur Belenduik, Esq.  
Smithwick & Belenduik, P.C.  
1990 M Street, N.W., Suite 510  
Washington, DC 20036  
Fax: 202-785-2804

13. This Agreement, including the Exhibits hereto, constitutes the entire understanding of the parties and no other consideration, action, or forbearance is contemplated or relied upon by them. This Agreement may be amended only by a written document executed by all parties.

14. No party may assign its rights or obligations hereunder without the express written consent of the other parties. Subject to the foregoing, this Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto and their heirs, successors, legal representatives and assigns.

15. This Agreement may be executed in one or more counterparts and the Agreement shall be binding when it has been executed by all of the parties.

16. The law of the State of California shall govern the enforcement and construction of this Agreement.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the date first set forth above.

**KIMLER BROADCASTING, INC.**

By: Helen Jones  
Helen Jones, President

**ARTISTIC AIRWAVES BROADCASTING**

By: \_\_\_\_\_  
Audrey Cilurzos, General Partner

**LAURA WILKINSON HERRON**

By: \_\_\_\_\_  
Laura Wilkinson Herron



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**KIMLER BROADCASTING, INC.**

By: \_\_\_\_\_  
Helen Jones, President

**ARTISTIC AIRWAVES BROADCASTING**

By:   
Audrey Cilurzo, General Partner

**LAURA WILKINSON HERRON**

By: \_\_\_\_\_  
Laura Wilkinson Herron

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By: \_\_\_\_\_

Helen Jones, President

**ARTISTIC AIRWAVES BROADCASTING**

By: \_\_\_\_\_

Audrey Cilurzos, General Partner

**LAURA WILKINSON HERRON**

By: \_\_\_\_\_

  
Laura Wilkinson Herron